

IN THE SUPREME COURT OF IOWA

No. 16-1364

KELLY BREWER-STRONG,

Petitioner-Appellant,

vs.

HNI CORPORATION,

Respondent-Appellee.

**APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
HONORABLE JOHN TELLEEN JUDGE
Muscatine No. CVCV023315**

**PETITIONER-APPELLANT'S
FINAL BRIEF AND
REQUEST FOR ORAL ARGUMENTS**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. **Whether the Commissioner erroneously interpreted the law when he applied the test set out in *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010), to decide whether Claimant was entitled to healing period benefits.**

APPELLATE CASES:

<u><i>Bell Bros. Heating & Air Conditioning v. Gwinn</i>, 779 N.W.2d 193 (Iowa 2010)</u>	3-6, 15-21, 24, 26-31, 34
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II. Whether the Commissioner erroneously interpreted the law when he determined that an employer may intentionally forfeit the right to control medical care and then later regain that right.

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<i>Winnebago Industries, Inc. v. Haverly</i> , 727 N.W.2d 567 (Iowa 2006).....	37
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WORKERS' COMPENSATION CASES

<i>Shariff v. Kraft Foods, Inc., & Indemnity Ins. Co., N.A.</i> , File No. 5037146 (App. Dec., 04/30/14).....	33
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ROUTING STATEMENT

Claimant-Appellant submits that the Iowa Supreme Court should retain this case because this case presents a substantial issue of enunciating or changing legal principles regarding how the Iowa Workers' Compensation Agency ("Agency") is applying the law. Iowa R. App. P. 6.1101(2)(f). The Agency applied the "beneficial care" test of *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010), and the *Gwinn* test led to an unfair and harsh result. (Arb. Dec., page 8) The Agency felt that the unfair and harsh result was mandated by *Gwinn*, and thus, Claimant requests that the Court revisit the holding in *Gwinn*.

In addition, Claimant submits that the Iowa Supreme Court should retain this case because this case presents an issue of first impression. Iowa R. App. P. 6.1101(2)(c). The Iowa Supreme Court has not specifically addressed whether an employer can regain control of an employee's medical care after initially denying liability for a work injury.

Employers should not be allowed to regain the power to control an employee's treatment after having once forfeited that right. The "whipsaw" of changing control will most often and most likely cause a change in treating physicians for the employee. This change could have a deleterious impact on an employee's recovery because it would disrupt an employee's ongoing relationship with her treating

physician, potentially result in major modifications in the treatment regimen, and most likely result in delays and interruptions of care.

STATEMENT OF THE CASE

I. Nature of the Case

This case is a review of the appeal decision of the Workers' Compensation Commissioner ("Commissioner") denying healing period benefits to the Claimant, Kelly Brewer-Strong ("Claimant"), for an injury she sustained while working for Defendant, HNI Corporation ("the Employer"). The Commissioner determined the physician who had performed surgery on Claimant, Thomas VonGillern, M.D., was not authorized by the employer. Consequently, the Commissioner held that under the test set out in *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010), Claimant could not recover healing period benefits during the time she recuperated from that surgery.

II. Proceedings in Front of the Workers' Compensation Commissioner

On August 22, 2014, Deputy Workers' Compensation Commissioner William Grell presided over the bifurcated arbitration hearing where the issue before the deputy was entitlement to healing period benefits.¹ At the bifurcated hearing, the Deputy did not decide the issue of entitlement to medical benefits.²

¹ Entitlement to Healing Period Benefits is detailed in Iowa Code subsection 85.34(1).

² Entitlement to Medical Benefits is detailed in Iowa Code section 85.27.

The record consists of: Claimant's Exhibits 1-39; Defendants' Exhibits A-F; the testimony of Jeff Reid; and the testimony of Claimant.

On November 12, 2014, the Deputy filed the Arbitration Decision where he found that the Claimant was not entitled to healing period benefits under the test set out in *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010). The Deputy noted that the test in *Gwinn* leads to an unfair and harsh result:

...This result [denial of healing period benefits] seems *unfair* because claimant was likely to have the bilateral arm surgeries performed by either Dr. Adams or Dr. VonGillern. If the surgeries were performed by Dr. Adams, claimant would be entitled to be compensated for healing period benefits for the disputed period of time. Having had the exact same surgeries performed by Dr. VonGillern, it becomes a *harsh result* to deny claimant benefits simply because she cannot prove she achieved a better result from the same treatment...

App. 13. Nevertheless, the Deputy reasoned that the harsh, unfair result was mandated by Iowa Supreme Court precedent in *Gwinn*:

...Nevertheless, the Iowa Supreme Court precedent in *Gwinn* appears to mandate this result when a claimant refuses to accept authorized medical care and cannot prove the unauthorized medical care was beneficial under the applicable legal standard. Therefore, I conclude that claimant is not entitled to healing period benefits for the period of time she was off work after the unauthorized surgery. *Id.*

App. 13.

On December 1, 2014, Claimant filed her Application for Rehearing. On December 8, 2014, Defendant filed a Response. On December 9, 2014, the Deputy filed the Ruling on Claimant's Application for Rehearing and affirmed his previous Arbitration Decision.

Claimant filed an Appeal to the Commissioner. On January 6, 2016, the Commissioner affirmed the Deputy's decision and "reached the same analysis, findings and conclusions as those reached by the deputy commissioner in all regards." App. 17.

III. Disposition of the Case in District Court

On July 19, 2016, the District Court upheld the Commissioner's decision in its entirety. The District Court ruled that the *Gwinn* test did apply to the issue of whether Claimant is entitled to healing period benefits:

...This Court finds no statute or case law that lays out such an exception to the *Bell Brothers* standard as Petitioner asserts the Commissioner should have applied in this case. Furthermore, the *Bell Brothers* case itself lays out no exceptions to its standard for determining whether an employee is entitled to healing period benefits based on unauthorized medical care...

App. 43.

The District Court also ruled that under the Iowa Workers' Compensation Act, the Employer was entitled to control Claimant's medical care after the Employer amended its Answer to admit liability for the work injury. App. 34-35.

STATEMENT OF THE FACTS

I. The Employer's authorized doctor treats Claimant's carpal tunnel injuries for a period of time.

On December 5, 2011, the Employer³ had authorized Dr. Tina Stec, an occupational physician, to treat and care for Claimant's injuries. App. 62-66. Due to Claimant's symptoms, Dr. Stec ordered a nerve test for both of Claimant's arms. *Id.* The nerve test, an EMG/NCV, revealed that Claimant had bilateral carpal tunnel syndrome. App. 67.

After the EMG/NCV results, Dr. Stec decided to conservatively treat Claimant's carpal tunnel injuries. App. 70; App. 72. Dr. Stec "gave [Claimant] bilateral rigid wrist braces today to wear at night to see if this calms this down." App. 70. Dr. Stec never referred Claimant to an orthopedic physician to evaluate her for the possibility of surgery. App. 70; App. 72.

The Employer had medical evidence regarding Claimant's carpal tunnel injuries. App. 70; App. 72. The Employer knew that Claimant's injuries were potentially related to her work activities with the Employer. *Id.* The Employer had an ongoing duty to reasonably investigate the claim regardless of whether a petition was filed with the Iowa Workers' Compensation Agency ("Agency"). App. 19.

³ Claimant will refer to Defendants HNI Corporation and Gallagher Bassett Services, Inc., collectively as "the Employer."

II. Claimant is forced to file a Petition with the Iowa Workers' Compensation Agency and the Employer denies liability in its Answer.

On June 4, 2012, Claimant served her Original Notice and Petition on the Employer⁴. App. 94 Claimant pled that she had sustained cumulative, bilateral arm injuries that arose out of and in the course of her employment on 01/26/12. *Id.* Claimant requested workers' compensation benefits, including medical benefits pursuant to Iowa Code section 85.27. *Id.*

Before serving an answer, the Employer believed it was important to solicit an "opinion letter" from Dr. Stec. App. 71-72. Specifically, the Employer requested an opinion letter on "whether there is a casual relationship between [Claimant's] diagnosis of bilateral carpal tunnel syndrome and her employment with [the Employer]." App. 71.

The Employer knew it was important to investigate into Dr. Stec's opinions, yet, the Employer nonetheless decided to deny the workers' compensation claim before receiving the expert, medical opinions. App. 71-72 & 95-96 The Employer never asked for an extension to file its Answer while it was waiting on Dr. Stec's opinions. *Administrative File*

⁴Defendant HNI Corporation is a self-insured employer. HNI Corporation insisted on listing its third-party administrator, Gallagher Basset Services, Inc., in the caption of the Answer. Claimant will continue to call HNI Corporation and Gallagher Bassett Services, Inc., collectively "the Employer."

On June 20, 2012, the Employer served its Answer and denied responsibility for the carpal tunnel injuries. App. 95-96 The Employer did *not* notify Claimant of its factual basis for denying workers' compensation benefits; Nor did the Employer give any indication that it actually conducted a reasonable investigation or evaluation. *Id.* The Employer simply denied liability. *Id.*

III. The Employer denies Claimant's Alternate Care Petition despite having a causation opinion from a treating doctor that showed Claimant's arm injuries were work-related.

After denying the Petition, the Employer received more medical evidence that Claimant's injuries were work related. App. 72. The Employer's attorney asked Dr. Stec to write down her medical, expert opinions in a letter. *Id.* Dr. Stec stated: "I do believe carpal tunnel can be/is related to her work activities." App. 72.

The Employer had an ongoing duty to investigate Claimant's injuries after the receipt of new evidence. App. 19. After receiving Dr. Stec's medical opinions, the Employer did not amend its Answer to admit liability, rather, the Employer chose to continue to deny the claim. App. 113.

After the Employer received Dr. Stec's medical opinion, Claimant made another request for medical care for her work injuries and informed the Employer that she was dissatisfied with the Employer's choice to abandon care of her injuries. App. 97-98. In this request, Claimant pointed out that a treating physician had

diagnosed Claimant with bilateral carpal tunnel injuries and that, in her expert medical opinion, Claimant's arm injuries are work-related. *Id.*

Claimant, who is not a doctor, did not list the exact plan of treatment for her carpal tunnel injuries in her dissatisfaction letter. *Id.* Claimant just knew that she continued to experience pain and discomfort and wanted the Employer to provide her with a competent, caring doctor. *Id.*

Despite having Dr. Stec's medical opinions, the Employer refused to authorize additional medical treatment for Claimant's injuries. App. 99-100. In this correspondence, the Employer continued to deny medical treatment because it believed that Dr. Stec's opinion "did not clearly establish a causal relationship between [Claimant's] employment with [the Employer] and her alleged bilateral carpal tunnel[.]" *Id.* There is no indication that the Employer ever intended on following up with Dr. Stec regarding her medical opinions *Id.*, even though the Employer had an ongoing duty to reasonably investigate the claim, App. 19.

Claimant later served her Application for Alternate Medical Care. App. 101-102. On September 6, 2012, the Employer denied liability for Claimant's bilateral arm injuries and thus, deprived Claimant of a hearing on her Application for Alternate Care. *Id.* The Employer did not notify Claimant of its factual basis for denying liability and did not give any indication that they actually followed up with Dr. Stec regarding her opinion; the Employer simply denied liability. *Id.*

The Iowa Workers' Compensation Agency dismissed the Claimant's Application for Alternate Medical Care. App. 47-48. The Agency stated that the Employer had forfeited its right to control the medical care of Claimant and the Employer is barred from asserting lack of authorization. *Id.*

IV. The Employer forces Claimant to submit to an evaluation with an expert.

On October 22, 2012, the Employer forced Claimant to undergo a medical evaluation with the Employer's expert, Dr. Brian Adams. App. 76-79. Dr. Adams did not recommend any medical care for Claimant's pain and discomfort. *Id.*

V. The Employer amended its Answer to admit liability and did not plead any affirmative defenses.

On November 8, 2012, the Employer chose to amend its Answer in order to admit liability for Claimant's arm injuries. App. 112-114. The Employer did not affirmatively plead a lack of authorization defense for its denial of healing period benefits; the Employer merely disputed the extent of healing period benefits. *Id.*

VI. The Employer did not follow through with second evaluation from its chosen doctor.

The Employer filed a Motion to Compel so that its expert, Dr. Adams, could conduct a second evaluation. Administrative File; *see also* App. 179-181. The Employer's Motion to Compel Examination was granted by the Agency. *Id.* To this day, the Employer has never scheduled the second evaluation with its chosen doctor *Id.*, even though Claimant has reached Maximum Medical Improvement App. 125.

Also, there is no indication that the Employer-Chosen doctor would actually accept Claimant as a patient. *Appendix*.

VII. Claimant undergoes surgery for her bilateral arm injuries and the Employer refuses to pay for healing period benefits.

Claimant sought medical treatment with Dr. Thomas VonGillern who performed surgery on both of her arms. App. 84-89. It is undisputed that Dr. VonGillern's surgery was causally connected to the work injury and that the fees charged for the surgery were fair and reasonable. App. 132-137.

While recovering from surgery, Claimant was off work for the time period of May 10, 2013 through July 21, 2013. App. 7 & 208-209. While she was off work, the Employer refused to pay Claimant any healing period benefits. App. 103-104.

Claimant applied for short-term disability benefits with the Employer. App. 105-111. For a period of time, the Employer sent only a portion of the amount of short term-disability benefits that Claimant was entitled to. *Id.* Even though the Employer refused to pay any workers' compensation benefits, the Employer took away a large portion of the short-term disability benefits "for Workers' Compensation benefits." App. 105-106.

After the Employer's reduction, Claimant received a grand total of twenty-five dollars for short-term disability benefits each week. App. 105. It was difficult for Claimant to survive on this amount of money because twenty-five dollars

“doesn’t put gas in a car, doesn’t pay for the light bill, the gas bill, [or] house payment.”

VIII. The Employer takes the deposition of Claimant’s treating surgeon

On April 28, 2014, the Employer took the deposition of Claimant’s treating surgeon, Dr. VonGillern. App. 124. The Employer asked Dr. VonGillern to testify about what treatment he believed Dr. Adams would hypothetically perform on Claimant. *Id.* The Employer also asked Dr. VonGillern to compare the outcome from the surgery he performed with the hypothetical outcome from a surgery performed by Dr. Adams. *Id.*

Dr. VonGillern testified that the surgeries that he performed were reasonable and beneficial. *Id.* Dr. VonGillern also testified that he expects Claimant, within a reasonable degree of medical probability, to have permanent partial disability as a result of her work injuries. *Id.*

IX. The Employer voluntarily pays Permanent Partial Disability Benefits.

On or about May 22, 2014, the Employer decided to voluntarily pay Permanent Partial Disability (“PPD”) Benefits. App. 117 & App. 118. The Employer issued a check in the amount of \$4,987.96 for PPD Benefits and accrued interest. *Id.* Although the Employer issued a check for PPD Benefits, the Employer did not issue a check for Healing Period Benefits. App. 103-104.

ARGUMENT

The Claimant, Kelly Brewer-Strong (“Claimant”), is entitled to Healing Period Benefits based on the plain language of the Iowa Workers’ Compensation Act. The Iowa Workers’ Compensation Act states:

Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1) (2016) (emphasis original). According to the plain language of Subsection 85.34(1), the employer shall pay to the employee compensation for a healing period if an employee has suffered a personal injury causing permanent partial disability (“PPD”). *Id.* Consequently, the statutory requirement for healing period benefits is met when an employee has suffered PPD.

Here, Claimant has suffered PPD. App. 127-128. In fact, the Employer has voluntarily paid PPD benefits. App. 117 & App. 118. Thus, Claimant has met the statutory requirement under Subsection 85.34(1) because she has suffered PPD.

Moreover, Claimant is requesting healing period benefits for the time period when she was recovering from a medically necessary surgery. While recovering from surgery, Claimant was off work for the time period of May 10, 2013 through

July 21, 2013. App. 7 & 208-209. This time period is undisputed, *Id.*, and it is undisputed that the carpal tunnel releases were causally related to the work injury. *Id.* & App. 132-138.

Nevertheless, the Agency felt that it was obligated to deny Claimant healing period benefits because of its interpretation of *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010). The Agency denied healing period benefits even though its interpretation of the law led to an unfair and harsh result. App. 13. While the Agency felt it was bound by the Court's precedent in *Gwinn*, Claimant submits that the Agency erred in interpreting the law and the Court has the power to clarify any misunderstanding.

The Commissioner erred in interpreting the law in two regards. First, the Commissioner erroneously interpreted the law when he applied the test set forth in *Gwinn* to an issue involving entitlement to healing period benefits. Second, the Commissioner erroneously interpreted the law when he ruled that the Employer regained control of medical care after it chose to intentionally forfeit this right.

I. The Commissioner erred in determining that Claimant was precluded from recovering healing period benefits under the test set forth in the Court's *Gwinn* decision.

The Commissioner erred in denying healing period benefits because the Commissioner should not have applied the test set forth in *Gwinn*. In that case, the Court decided "whether an employer can be liable for medical benefits under section

85.27 based on unauthorized medical care to treat a work injury.” *Gwinn*, 779 N.W.2d at 202. The Court explained that “[i]n this context, unauthorized medical care is beneficial if it provides a *more* favorable outcome than would likely have been achieved by the care authorized by the employer.” *Id.* at 206 (emphasis added).

The *Gwinn* Court went further and then addressed entitlement to healing period benefits. *Id.* at 209. Specifically, the *Gwinn* Court held that the employer could not be held liable for healing period benefits based on recovery time from an unauthorized surgery where the unauthorized medical care was not “reasonable and beneficial.” *Id.*

First, Claimant requests that the Court announce that the test in *Gwinn* should never be applied when deciding entitlement to healing period benefits. Claimant submits that the holding in *Gwinn* is inconsistent with a plain reading of the code section that actually controls healing period benefits, Iowa Code subsection 85.34(1).

Second, Claimant submits that this case is distinguishable from *Gwinn* on its facts, and therefore, *Gwinn* is not controlling. Here, the same surgery would have been performed regardless of which physician had been authorized to treat Claimant. Therefore, unlike the situation in *Gwinn*, there is really no dispute with respect to the merit and value of the surgery, and consequently, there was no dispute, as there was in *Gwinn*, that the treatment “was causally related to the injury.”

Claimant submits that the plain language of Subsection 85.34(1) allows for a fair and just result of Claimant receiving healing period benefits; however, if there is any ambiguity, the Court should interpret the Iowa Workers' Compensation Act in favor of the Claimant. *See Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted) (“It is well established that ‘[w]e liberally construe workers' compensation statutes in favor of the worker,’ because ‘[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.’”)

Under these circumstances, the Agency's denial of healing period benefits becomes a penalty, which is not supported by *Gwinn* and is certainly not supported by the intent underlying the Iowa Workers' Compensation Act. Accordingly, the Court should rule that the Commissioner's denial of healing period benefits was based on an erroneous interpretation of the law.

A. Error Preservation

Claimant preserved error when she alerted the Iowa Workers' Compensation Agency to this issue with: Claimant's Post-Hearing Brief; Claimant's Application for Rehearing; and Claimant's Appeal to the Iowa Workers' Compensation Commissioner.

In her Post-Hearing Brief, Claimant argued that she was entitled to healing period benefits because she had surgery and was off work for a period of time. *See* App. 271. In fact, Claimant wrote the following:

...Any argument that relies on the authorization defense is misplaced because this is a bifurcated hearing on HP Benefits. *See Vaske v. Wal-Mart Stores, Inc. & Am. Home Assurance Corp./AIG*, File No. 5031848 (Review-Reopen Dec. 08/12/13) (Deputy Grell) (“I conclude that healing period benefits are payable under Iowa Code section 85.34(1) anytime that an injury results in the need for additional invasive treatment, or time off work that is anticipated to result in improvement of the underlying condition and improvement of the industrial disability.”) Thus, the authorization defense is irrelevant to whether Claimant is entitled to HP Benefits because Claimant has shown that her injuries resulted in the need for invasive treatment and time off work...

App. 271.

On the other hand, the Employer wrote that the Agency must first determine whether care was “authorized” or “unauthorized” before determining entitlement to healing period benefits:

...The claimant’s burden of proof to establish entitlement to healing period or temporary disability benefits resulting from treatment by an unauthorized physician was recently addressed by the Iowa Supreme Court in the case of *Bell Bros. Heating and Air Conditioning v. Gwinn*, 799 N.W.2d 193 (2010). At issue in the *Gwinn* case was whether the claimant was entitled to healing period or temporary total disability benefits during his treatment by an unauthorized physician...the claimant must prove that the care she chose to obtain with Dr. VonGillern was “reasonable and beneficial,” otherwise defined as care which “provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.” *See Bell Bros. Heating and Air Conditioning v. Gwinn*, 799 N.W.2d 193, 2014 (Iowa 2010)...

App. 275-281.

The Deputy in the Arbitration Decision decided the issue of healing period benefits by applying the test laid out in *Gwinn*:

...Nevertheless, the Iowa Supreme Court precedent in *Gwinn* appears to mandate this result when a claimant refuses to accept authorized medical care and cannot prove the unauthorized medical care was beneficial under the applicable legal standard...

App. 132.

Claimant filed an Application for Rehearing and argued that *Gwinn* does not apply to healing period benefits. The Employer resisted and argued that *Gwinn* did apply to healing period benefits. App. 284. The Deputy affirmed its previous decision on the Application for Rehearing.

Claimant appealed, and the Commissioner affirmed the Deputy's decision with the "the same analysis, findings and conclusions as those reached by the deputy commissioner in all regards." App. 17.

B. Standard of Review

Claimant submits that the standard of review is for errors of law. "If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a statute, then the reviewing court must reverse the agency's interpretation if it is erroneous." *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256-47 (Iowa 2012) (citing Iowa Code § 17A.19(10)(c) (emphasis original)). This issue involves the Agency's interpretation of Iowa Code section 85.27 and Iowa Code section 85.34(1).

The Agency has not been clearly vested with the authority to interpret the provisions of the law that are on review for the Court. The Agency has not been

clearly vested with the authority to interpret Iowa Code section 85.27. *Gwinn*, 799 N.W.2d at 193. Nor has the Agency been clearly vested with the authority to interpret Iowa Code subsection 85.34(1). *Waldinger Corp. v. Mettler*, 817 N.W.2d 1, 7 (Iowa 2010). Thus, Claimant submits that the standard of review is for errors of law because this issue involves the Agency's interpretation of the law that the Agency has not been clearly vested with the authority to interpret.

C. The Court should announce that the test in *Gwinn* does not apply to the issue of entitlement to healing period benefits.

The Court should announce to the Agency that the test in *Gwinn* has a limited application. Specifically, the Agency should limit the application of the *Gwinn* test to the issue of entitlement to medical benefits. In contrast, the Agency should never apply the *Gwinn* test when deciding the issue of entitlement to healing period benefits. Thus, the Court should announce the holding in *Gwinn* should be properly limited to the issue of entitlement to medical benefits, and consequently, the Commissioner erred in applying the *Gwinn* test to the issue of entitlement to healing period benefits.

First, Claimant submits that the Court's holding in *Gwinn* is based on shaky precedent that interpreted different code sections. Second, Claimant submits that Court's holding in *Gwinn* conflicts with the plain language of Iowa Code subsection 85.34(1), the subsection that controls entitlement to healing period benefits. Third, if the Courts rule that the language of Subsection 85.34(1) is ambiguous, then the

Court should interpret the language in favor of Claimant and allow for her to receive healing period benefits.

1. The *Thilges* Court never interpreted Iowa Code § 85.34(1), the subsection that controls entitlement to healing period benefits.

In 1995, the Court decided the case of *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614. The *Thilges* Court never interpreted Iowa Code subsection 85.34(1), the subsection that controls entitlement to healing period benefits. Rather, the *Thilges* Court interpreted Iowa Code section 85.39. *Id.* at 617.

The *Thilges* Court also looked at Iowa Code subsections 85.33(3) and 85.33(4). *Id.* at 617. The *Thilges* Court had already determined that an employee had to meet certain requirements under section 85.39 before she was compensated for lost time to attend medical appointments for her work-related injuries. *Id.* The *Thilges* Court then interpreted subsections 85.33(3) and 85.33(4) to determine if a worker would be compensated for lost time to attend medical appointments for her work-related injuries.

Iowa Code subsection 85.33(2) states:

2. "Temporary partial disability" or "temporarily, partially disabled" means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. "Temporary partial benefits" means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability. Temporary partial benefits shall not be considered benefits payable to an employee, upon termination

of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury.

(2016). Unlike Section 85.39, this subsection does not contemplate lost time to attend a medical appointment. Rather, subsection 85.33(2) contemplates lost earnings when an employee returns to work with restrictions and earns less on a weekly basis as a result.

Iowa Code subsection 85.33(3) states:

3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

(2016). Unlike section 85.39, this subsection does not contemplate lost time to attend a medical appointment. Rather, subsection 85.33(3) contemplates payment of temporary partial disability benefits when an employer offers “suitable work.”

The *Thilges* Court never interpreted Iowa Code subsection 85.34(1) – the subsection that controls entitlement to healing period benefits. *Thilges*, 528 N.W.2d at 614. Consequently, *Thilges* should not be used as precedent to determine entitlement to healing period benefits because it would be precedent that is founded on the interpretation of different sections of the Iowa Workers’ Compensation Act.

2. **The Court should limit the holding in *Gwinn* to Iowa Code § 85.27, the subsection that controls entitlement to medical benefits, because it conflicts with the plain language of Iowa Code § 85.34(1), the subsection that controls entitlement to healing period benefits.**

The Court should limit the holding in *Gwinn* to Iowa Code section 85.27, the subsection that controls entitlement to medical benefits, because the *Gwinn* holding conflicts with the plain language of Iowa Code subsection 85.34(1), the subsection that controls entitlement to healing period benefits.

When called upon to interpret a statute, a court should first determine whether the legislative enactment is ambiguous. *See Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 859 (Iowa 2009). If it is clear and unambiguous, the court should give the statute a plain and rational meaning. *Id* Here, the plain and rational meaning of Iowa Code subsection 85.34(1) is that there is one – and only one - statutory requirement to entitlement to healing period benefits.

The plain and rational meaning of Iowa Code subsection 85.34(1) is that an employee must have permanent partial disability from the work injury in order to be entitled to healing period benefits. The plain language of the Subsection is: “*if* an employee has suffered a personal injury causing permanent partial disability which compensation is payable[.]”⁵ Iowa Code subsection 85.34(1) (emphasis added). The

⁵ Iowa Code subsection 85.34(1) also describes how to determine the length of the healing period.

plain language of “if” signals the statutory requirement that follows (“an employee has suffered a personal injury causing permanent partial disability which compensation is payable...”). Thus, the Subsection has one clear and unambiguous requirement for healing period benefits.

On the other hand, the plain language of Iowa Code subsection 85.27(4) supports a requirement that an employer is only responsible for paying for medical care if that medical provider was “authorized.” Iowa Code subsection 85.27(4) states in relevant part:

4. For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization....

(2016). The plain language supports the requirement that if the employer chooses the medical provider, then the employer must pay the medical provider for the cost of that care. *See* Iowa Code subsection 85.27(4) (“...If the employer chooses the care, the employer shall hold the employee harmless for the cost of care...”).

The Court can look towards the plain language of Iowa Code subsection 85.27(4) to see how the legislature attempted to balance the competing interests of the employer and the injured worker when it comes to the payment of medical benefits. On one side of the scale, an employer has an economic interest in controlling the medical care of the injured worker. The employer has a financial

incentive to choose a medical provider that will provide the medical care for the cheapest amount of money.

On the other side of the scale, the injured worker has the interest in receiving prompt medical care from qualified, caring medical providers. Consequently, the Court can find the legislative intent of balancing competing interests in the plain language of Iowa Code subsection 85.27(4) (“...If the employer chooses the care, the employer shall hold the employee harmless for the cost of care...”).

The plain language of Iowa Code subsection 85.27(4) may support the harsh interpretation that an employer is only responsible for paying for “authorized care”; however, the plain language of Iowa Code subsection 85.34(1) does not support the harsh interpretation that an employer is only responsible for paying for benefits when the healing period comes from “authorized care.”

Claimant submits that there is no statutory requirement that a healing period must come from “authorized care,” yet, the *Gwinn* Court wrote the following:

...In a related context, we have held a claimant who misses work to attend unauthorized medical care appointments is not entitled to healing-period benefits. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). We observed that the applicable statutes provide no indication that the legislature intended workers to receive awards for unauthorized medical appointments in the normal course of events. *Id.*

Gwinn, 779 N.W.2d at 209. The *Gwinn* Court discussed the legislation’s intent towards healing period benefits. *See Id.* (“We observed that the applicable statutes provide no indication that the legislature intended workers to receive awards...”)

As discussed in the previous section, the *Thilges* Court never interpreted Iowa Code subsection 85.34(1) – the subsection involving entitlement to healing period benefits. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614 (Iowa 1995). Consequently, *Thilges* should not be used as precedent to determine entitlement to healing period benefits.

Instead of looking toward cases that interpreted other parts of the Iowa Workers' Compensation Act, the Court should first look to the plain language of Iowa Code subsection 85.34(1), which states: The employer shall pay to the employee compensation for a healing period if an employee has suffered a personal injury causing permanent partial disability.

The plain reading of Iowa Code subsection 85.34(1) is that healing period benefits are only dependent on whether an “employee has suffered a personal injury causing permanent partial disability”.⁶ This Subsection does not have a requirement that an employer is only responsible for paying for benefits if the healing period comes from “authorized care.” and consequently, the Court should announce that the *Gwinn* test does not apply to the issue of entitlement to healing period benefits.

⁶ Iowa Code subsection 85.34(1) also describes how to determine the length of the healing period.

3. If the Court rules that the language of Iowa Code § 85.34(1) is ambiguous, then the Court should interpret this Subsection in the favor of Claimant and allow for the entitlement to healing period benefits.

If the Court finds the language of Iowa Code subsection 85.34(1) is ambiguous, then the Court should interpret the Subsection in the favor of Claimant and allow for the entitlement to healing period benefits. If a statute is ambiguous, the court should rely on well-established rules to aid our interpretation. *See Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 859 (Iowa 2009). It is well-established rule that the Iowa Workers' Compensation Act should be broadly and liberally interpreted in favor of an injured worker. *See Zomer v. W. River Farms, Inc.*, 666 N.W.2d 130, 133 (Iowa 2003).

A statute or rule is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. *Id.* Here, one may argue that reasonable minds could differ as to the meaning of: "an employee has suffered a personal injury causing permanent partial disability which compensation is payable...." Specifically, one may argue that reasonable minds may differ on the meaning of the phrase "which compensation is payable." Even if this is the case, the Court should interpret the language in favor of Claimant.

A reasonable mind could interpret the phrase "which compensation is payable" to mean when an employee sustains a compensable injury. In this case, it is undisputed that Claimant sustained a compensable injury, and consequently, the

phrase should be interpreted in that manner because this interpretation allows Claimant to recover healing period benefits for her compensable injury. Moreover, this favorable interpretation of the phrase “which compensation is payable” would avoid an unfair, harsh result. *See App. 13.*

D. Even if the Court applies the holding of *Gwinn* to certain cases involving entitlement to healing period benefits, the Court should not apply the test in *Gwinn* to the facts of this case because the facts in this case are distinguishable.

Even if the Court continues to apply the test in *Gwinn* to certain cases involving healing period benefits, the Court should not apply the *Gwinn* test to the present case because of important, factual differences. In this Case, it was undisputed that Claimant received the exact same medical care that was recommended by the Employer-Chosen physician.

In *Gwinn*, the employee, Gwinn, was examined by a physician, Dr. Pichler, who recommended surgery to treat Gwinn’s foot and ankle problems. *Id.* at 197. When Gwinn requested that the employer pay for the treatment recommended by Dr. Pichler, the employer refused, and authorized Gwinn to see Dr. Galles, an orthopedic physician. *Id.* Dr. Galles recommended physical therapy for Gwinn’s continuing problems. *Id.* Thereafter, Gwinn had Dr. Pichler perform the surgery, and then sought payment for the surgery, as well as healing period benefits, from the employer. *Id.* at 198.

In deciding that Gwinn could not recover healing period benefits, the Court stated:

The healing-period benefits awarded by the commissioner in this case were based solely on Gwinn's recovery time from the unauthorized casting and surgery performed by Dr. Pichler. Without substantial evidence to support a finding that the unauthorized medical care was reasonable and beneficial under the totality of the circumstances, there was no evidence to support a finding that the temporary disability on account of the unauthorized casting and surgery was causally related to the injury.

Id. at 209 (emphasis added). Thus, the merit and value of the treatment itself was at issue in *Gwinn*.

In contrast to the situation in *Gwinn*, the evidence in this Case showed that – *hypothetically* – had Claimant obtained treatment for her injury with Dr. Adams, the Employer-Chosen physician, Dr. Adams, would have recommended and performed surgery just as Dr. VonGillern did. App. 13.

Thus, the facts of this Case differ in an important respect from *Gwinn* as the merit and value of the unauthorized treatment was not in dispute. This difference is highly relevant to whether an employee should be able to recover healing period benefits resulting from treatment by an unauthorized physician.

The Court should acknowledge this important, factual difference and allow Claimant to receive healing period benefits for her compensable injury. The Iowa Supreme Court has consistently stated: “It is well established that ‘[w]e liberally construe workers' compensation statutes in favor of the worker,’ because ‘[t]he

primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.”” *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted). It would be contrary to this underlying rule of interpretation with respect to the workers' compensation statute to deny healing period benefits for recovery time that would have been required regardless of whether an authorized or unauthorized physician provided the treatment. When benefits are denied under these circumstances, the denial is not based on a failure to prove beneficial care, as it was in *Gwinn*, but rather becomes a penalty exacted from the employee for having the procedure performed by an unauthorized physician. This imposition of a penalty is not supported by *Gwinn* and certainly not supported by the intent underlying the workers' compensation statute.

Accordingly, this Court should rule that the Commissioner's denial of healing period benefits was based on an erroneous interpretation of the law and should reverse the Commissioner's decision.

E. To the extent that the holding in *Gwinn* created an additional requirement to healing period benefits, Claimant requests that the Court overrule *Gwinn* because it imposed an impossible standard on Claimant.

To the extent the *Gwinn* Court created an additional statutory requirement to the entitlement to healing period benefits, Claimant requests that that Court overrule *Gwinn* because it imposed an impossible standard on Claimant. The *Gwinn* Court charged the Agency with applying an impossible standard: did Claimant achieve a better result from Dr. VonGillern's surgery than from the hypothetical result of the same surgery if Dr. Adams had performed the procedure instead? *See* App. 13. ("...Having had the exact same surgeries performed by Dr. VonGillern, it becomes a harsh result to deny claimant benefits simply because she cannot prove she achieved a better result from the same treatment...")

The Agency was tasked with determining the hypothetical result that Claimant would have experienced if she had the same surgery with a different doctor. Then, the Agency had to compare the hypothetical outcome to her actual outcome. Not surprisingly, the Agency held that Claimant did not meet her burden of showing a "more" favorable outcome because the impossible standard calls for the fact finder to speculate about a hypothetical outcome.

II. The Commissioner erred in ruling that the Employer had regained the right to control Claimant's medical care after it intentionally forfeited this right.

The Employer forfeited its right to control Claimant's medical treatment when it denied responsibility for her work injury. Generally, employers have the power to choose the doctors that provide treatment to injured employees, i.e., "control the medical treatment of an employee." *Cf. Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119 (Iowa 2003) with 820 ILCS 305/8 ("The employee may at any time elect to secure his own physician, surgeon and hospital services at the employer's expense...").

However, employers do not have absolute power and control over an employee's medical care. *See* Iowa Code §85.27(4). Employers will lose this right if they do not provide prompt, reasonable medical care to treat the employee's injuries. *See Shriver*, 661 N.W.2d 119. For example, an employer does not have the power to force an employee to continue seeing a doctor when there is a "breakdown" in the physician-patient relationship. *E.g., Shariff v. Kraft Foods, Inc., & Indemnity Ins. Co.*, N.A., File No. 5037146 (App. Dec., 04/30/14).

Employers forfeit this power to control medical treatment when they deny liability for a work injury. *Shriver*, 661 N.W.2d at 124; *West Side Transp. v. Cordell*, 601 N.W.2d 691, 694 (Iowa 1999). If the employer is refusing to pay for the employee's medical treatment, then the injured employee is free to receive medical

care from a doctor of her own choosing. *See R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 198 (Iowa 2003).

Here, the Employer forfeited its right to control Claimant's medical care under two different lines of legal precedent: (A) the Iowa Supreme Court's decision in *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 198 (Iowa 2003); and (B) the Law of the Case Doctrine.

A. Error Preservation

Claimant preserved error when she alerted the Iowa Workers' Compensation Agency to this issue with: Claimant's Post-Hearing Brief; Claimant's Application for Rehearing; and Claimant's Appeal to the Iowa Workers' Compensation Commissioner.

B. Standard of Review

Claimant submits that the standard of review is for errors of law. "If the agency *has not* been clearly vested with the authority to interpret a provision of law, such as a statute, then the reviewing court must reverse the agency's interpretation if it is erroneous" *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256-47 (Iowa 2012) (citing Iowa Code § 17A.19(10)(c) (emphasis original)). This issue involves the Agency's interpretation of Iowa Code section 85.27.

The Agency has not been clearly vested with the authority to interpret the provisions of the law that are on review for the Court. The Agency has not been

clearly vested with the authority to interpret Iowa Code section 85.27. *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010). Thus, Claimant submits that the standard of review is for errors of law because the issue involves the Agency's interpretation of provisions of law that the Agency has not been clearly vested with the authority to interpret.

C. Under the Court's *Barnett* decision, the employer forfeited its right to control Claimant's medical care when it denied liability.

An employer intentionally forfeits the power to control an injured employee's medical treatment when it denies liability in an answer to application for alternate care. *See Barnett*, 670 N.W.2d at 198. "Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." *Id.*

In *Barnett*, the employee filed an application for alternate care in front of the Iowa Workers' Compensation Agency. The employee's application for alternate care was dismissed by the Agency because the employer denied liability for a portion of the disability claim. As a result of the employer's denial, the Agency ruled that the employer could not defend against any future claim by the employee for alternate care on the basis that the care was not authorized.

On appeal, the Iowa Supreme Court affirmed the Iowa Workers' Compensation Commissioner for properly dismissing the application for alternate care and barring the employer from raising the authorization defense for expenses related to alternate medical care.

Here, Claimant filed an application for alternate care in front of the Agency and the application was dismissed by the Agency because the Employer denied liability of the claim. The factual circumstances are nearly identical to those in *Barnett*. Thus, the Court's holding in *Barnett* should apply to this case.

Arguably, the Court has not specifically addressed whether an employer can regain control of the medical care after initially denying liability for a work injury and then amending its answer. Yet, employers should not be allowed to regain the right to control an employee's treatment after having once forfeited that right. The "whipsaw" of changing control will most often and most likely cause a change in treating physicians for the patient. This change could have a deleterious impact on an employee's recovery because it would disrupt an employee's ongoing relationship with her treating physician, potentially result in minor or major modifications in the treatment regimen, and most likely result in delays and interruptions in treatment or therapy as physical care is transferred from one physician to another. Given that the worker's compensation statute is to be construed liberally in favor of the employee, an interpretation of the statute that

would be disruptive to an employee's treatment and recovery would be contrary to the purpose of Iowa's workers' compensation law.

D. Under the Law of the Case Doctrine, the Employer forfeited the right to control Claimant's medical treatment.

The Agency should have applied the Law of the Case Doctrine because the Commissioner has already decided that the Employer was barred from raising the Authorization Defense. The Law of the Case Doctrine represents the practice of courts to "refuse to reconsider what has once been decided." *Winnebago Industries, Inc. v. Haverly*, 727 N.W.2d 567, 573 (Iowa 2006). Under the doctrine, once a reviewing court has expressed views or announced legal principles, those views and legal principles are binding throughout further progress of the case among litigants, the trial court, and the appellate courts. *Id.*

In *Haverly*, the Court did not apply the Law of the Case Doctrine because the Agency must actually decide an issue before the Law of the Case Doctrine will apply. Specifically, the Court reasoned that the Agency did not decide the employer's liability for benefits during the alternate care proceeding. The Court further explained that the Agency could not decide the issue of liability during the alternate care proceeding.

Unlike the issue of liability, the Agency does decide the issue of the Authorization Defense during an alternate care proceeding. *Barnett*, at 198. "Once an employer takes the position in response to a claim for alternate medical care that

the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.” (*Id.*)

In *Barnett*, the employee filed an application for alternate care in front of the Iowa Workers’ Compensation Agency. The employee’s application for alternate care was dismissed by the Agency because the employer denied liability for a portion of the disability claim. As a result of the employer’s denial, the Agency ruled that the employer could not defend against any future claim by the employee for alternate care on the basis that the care was not authorized.

On appeal, the Court affirmed the Iowa Workers’ Compensation Commissioner for properly dismissing the application for alternate care and barring the employer from raising the authorization defense for expenses related to alternate medical care.

Here, the Agency issued an order on September 10, 2012. In this order, the Agency ruled that: “defendants are barred from asserting lack of authorization as a defense[.]” App. 47. This ruling was decided under the authority delegated by the Commissioner. Furthermore, this ruling cited to *Barnett* as legal authority.

The Employer had the right to seek judicial review, however, it chose to forfeit their right to make an appeal. Consequently, the Commissioner’s order became the law of the case.

Any argument that the Employer could change the law of the case is without merit. The Agency's decision on the Authorization Defense had already become binding when the Employer amended its Answer to admit liability. *See State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987) ("It is a rule which provides that the legal principles announced and the views expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the case upon the litigants, the trial court and this court in later appeals.") Thus, the Employer's subsequent actions did not change the law of the case at the time of the Arbitration Hearing or at the time of the Appeal Decision.

Any argument that the Law of the Case Doctrine does not apply because the facts and the issues had changed mischaracterizes the Law of the Case Doctrine. The law of the case established by the Agency in this case does not fall under the exception to the Law of the Case Doctrine.

The Law of the Case Doctrine is not applicable if the facts before the court upon the second trial are materially different from those appearing upon the first. *Lawson v. Fordyce*, 237 Iowa 28, 32, 21 N.W.2d 69, 73 (1945) (quoting *Russ v. American Cereal Co.*, 121 Iowa 639, 640, 96 N.W. 1092, 1092 (1903)); *In re Lone Tree Community School District*, 159 N.W.2d 522, 526 (Iowa 1968).

Here, the Employer is attempting to relitigate the same legal issue that was decided by the Agency in the alternate care proceeding. In the alternate care

proceeding, the Agency decided the issue of Authorization Defense. (Order of Dismissal of Alternate Medical Care, 09/10/12) Specifically, the Agency ordered that: “defendants are barred from asserting lack of authorization as a defense[.]” (*Id.*) Here, the Commissioner was asked to decide the issue of Authorization Defense, i.e., whether a treating doctor was “authorized.” Thus, the Commissioner was presented with the same legal issue (i.e., whether the Authorization Defense applied) during the Appeal Decision that was presented to the Agency during the prior alternate care proceeding (i.e., whether the Authorization Defense applied).

Moreover, the Commissioner was presented with the same operative fact on the issue of Authorization Defense that the Agency was presented with: The operative fact – which remains undisputed – the Employer intentionally denied liability to the application for alternate medical care and deprived Claimant a hearing on her application for alternate care. The Employer did not present any new evidence regarding the operative fact. For example, the Employer has not presented evidence that this denial was a mistake or inadvertent.

Any argument that mentions Claimant’s subsequent medical care is immaterial to whether the Employer denied liability at a previous alternate care hearing. In other words, evidence on Claimant’s subsequent medical care does not change the undisputed fact that that the Employer denied liability at a previous alternate care hearing.

Thus, the Commissioner should have applied the Law of the Case Doctrine to the issue of Authorization Defense because it is the same issue decided by the Agency in the previous alternate care proceeding and the Commissioner is presented with the same operative fact (the Employer's denial of the application for alternate medical care) that was outcome determinative for the Agency's decision in the previous alternate care proceeding. Consequently, the Commissioner erred in interpreting the law to allow the Employer to assert an Authorization Defense because the Employer was barred to do so under the Law of the Case Doctrine.

CONCLUSION

For the reasons stated above, the Court should reverse the Commissioner's determination by ruling that Claimant is entitled to healing period benefits, and then, order the Employer to pay benefits for the healing period starting with May 10, 2013 and going through July 21, 2013.

REQUEST FOR ORAL ARGUMENTS

Claimant requests that the case be submitted with oral arguments.

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

We hereby certify that the costs paid for printing Claimant-Appellant's Brief
was the sum of \$_____.

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/s/ Anthony J. Bribriesco

Signature

01/12/17

Date